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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONNECTION DISTRIBUTING CO., *et al.*,
Petitioners,

—v.—

ERIC H. HOLDER, JR., Attorney General,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals, sitting *en banc*, over the dissent of six judges in four dissenting opinions, upheld 18 U.S.C. § 2257 and its implementing regulations on their face and as applied under the First Amendment. The statute requires anyone who produces any book, magazine, videotape, picture, digital image or other matter containing a sexually explicit visual depiction to obtain photo identification and keep records on everyone in the depiction, and to place a label on every copy of the matter disclosing where the records are maintained. These records must be kept available for government inspection. However, the statute's effect upon the petitioners, a publisher of swingers' magazines and a married couple who embraces that lifestyle, has been to silence their expression, because adult citizens who wish to submit sexually explicit messages for publication will not give up their anonymity by submitting photo identification for government inspection.

1. Are 18 U.S.C. § 2257, and its implementing regulations, unconstitutional as applied to petitioners under the First Amendment?

2. Is 18 U.S.C. § 2257, which by its plain terms applies to all sexually explicit visual depictions – both commercial and non-commercial – and imposes a universal age verification requirement, without regard to the obvious maturity of those depicted, unconstitutional on its face under the First Amendment due to overbreadth?

3. Is 18 U.S.C. § 2257 a content based regulation

of speech that must withstand strict scrutiny, as the dissent concluded, or is it content neutral and, therefore, subject to intermediate scrutiny, as the majority of the *en banc* court held?

4. Does the *en banc* court's decision conflict with this Court's decisions in *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002) and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)?

LIST OF PARTIES AND CORPORATE DISCLOSURE

The parties to the proceedings in the lower court were Connection Distributing Company, Rondee Kamins, John Doe and Jane Doe as Appellants and The Honorable Eric H. Holder, Jr., in his official capacity as Attorney General of the United States of America, as Appellee.

Melo International Inc. is the parent corporation of Petitioner Connection Distributing Company. No publicly held company owns stock in Connection Distributing Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND CORPORATE DISCLOSURE iii

TABLE OF AUTHORITIES viii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 18

I. THE *EN BANC* DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF 18 U.S.C. § 2257 AND ITS IMPLEMENTING REGULATIONS ON THEIR FACE AND AS APPLIED, OVER THE DISSENT OF SIX MEMBERS OF THE COURT IN FOUR SEPARATE OPINIONS, RAISES IMPORTANT QUESTIONS UNDER THE FIRST AMENDMENT. 18

TABLE OF CONTENTS (cont'd)

A. An Important Question Is Presented as to Whether 18 U.S.C. § 2257 and Its Implementing Regulations Are Unconstitutional Under the First Amendment As Applied to Petitioners 18

B. An Important Question Is Presented as to Whether 18 U.S.C. § 2257, Which By Its Plain Terms Applies to All Sexually Explicit Visual Depictions – Both Commercial and Non-Commercial – and Imposes a Universal Age Verification Requirement, Without Regard to the Obvious Maturity of Those Depicted, Is Unconstitutional on Its Face Under the First Amendment Due to Overbreadth ... 21

C. An Important Question Is Presented as to Whether 18 U.S.C. § 2257 Is a Content-Based Regulation of Speech That Must Withstand Strict Scrutiny, as the Dissent Concluded, or a Content-Neutral Regulation and, Therefore, Subject to Intermediate Scrutiny, as the Majority of the *En Banc* Court Held 26

II. THE *EN BANC* COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *WATCHTOWER BIBLE & TRACT SOCIETY OF N.Y., INC. v. VILLAGE OF STRATTON*, 536 U.S. 150 (2002) AND *ASHCROFT v. FREE SPEECH COALITION*, 535 U.S. 234 (2002) 28

TABLE OF CONTENTS (cont'd)

CONCLUSION 29

APPENDIX (bound separately)

Opinion of the United States Court of Appeals for the Sixth Circuit *En Banc*, February 20, 2009 ..... App. 1

Judgment of the United States Court of Appeals for the Sixth Circuit *En Banc*, February 20, 2009 ..... App. 104

Order of the United States Court of Appeals for the Sixth Circuit, April 10, 2008 .. App. 106

Opinion of the United States Court of Appeals for the Sixth Circuit, October 23, 2007 App. 108

Memorandum of Opinion of the United States District Court for the Northern District of Ohio, May 10, 2006 ..... App. 172

Per Curiam Order of the United States Court of Appeals for the Sixth Circuit, September 24, 2002 ..... App. 197

Memorandum of Opinion of the United States District Court for the Northern District of Ohio, May 25, 2000 ..... App. 200

Opinion of the United States Court of Appeals for the Sixth Circuit, August 13, 1998 ..... App. 217

TABLE OF CONTENTS (cont'd)

Memorandum of Opinion of the United States District Court for the Northern District of Ohio, January 16, 1997 .... App. 252

U.S. Const., Amend. I ..... App. 265

Title 18 U.S.C. §2257 ..... App. 266

Title 28 C.F.R. § 75.1, *et seq.* —Child Protection Restoration and Penalties Enhancement Act of 1990 and Record-Keeping and Record-Inspection Provisions ..... App. 272

Adam Walsh Child Protection and Safety Act of 2006 Pub. L. 109-248, Title V, §§ 501, 502, 503 ..... App. 289

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 20

American Library Association v. Barr,
794 F. Supp. 412 (D.D.C.1992) 2

American Library Association v. Barr,
956 F. 2d 1178 (D.C. Cir. 1992) 2

American Library Association v. Reno,
33 F. 3d 78 (D.C. Cir. 1994)
cert denied, 515 U.S. 1158 (1995) 2

American Library Association v. Reno,
47 F. 3d 1215 (D .C. Cir. 1995) 3

American Library Association v. Thornburgh,
713 F. Supp. 469 (D.D.C. 1989) 2

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 12, 24, 28, 29

Borden v. Sch. Dist. of Tp. of East Brunswick,
523 F.3d 153 (3rd Cir. 2008) 25

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 12

Connection Distributing Co. v. Reno,
526 U.S. 1087 (1999) 12

TABLE OF AUTHORITIES (cont'd)

Crawford v. Metropolitan Government of Nashville and Davidson County, __U.S. __, 129 S.Ct. 846 (2009) 15

Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727 (1996) 11, 20

Faustin v. City and County of Denver, 423 F.3d 1192 (10th Cir. 2005) 26

Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 525 F.3d 1073 (11th Cir. 2008) 25

Gonzales v. Carhart. 550 U.S. 124 (2007) 20

Jacobellis v. Ohio, 378 U.S. 184 (1964) 23

LaMont v. Postmaster General, 381 U.S. 301 (1965) 28

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 11, 28

Sable Communication v. FCC, 492 U.S. 115 (1989) 20

Shelton v. Tucker, 364 U.S. 479 (1960) 23

Sundance Associates, Inc. v. Reno, 139 F.3d 804 (10th Cir. 1998) 2

Talley v. California, 362 U.S. 60 (1960) 23

TABLE OF AUTHORITIES (cont'd)

United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973) 10

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 10, 12

United States v. Stevens, 533 F.3d 218 (3rd Cir. 2008) *en banc, cert. granted*, __U.S. __ 77 USLW 3574 (Apr. 20, 2009) 25

United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988) 24

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 19, 20, 27

Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) 12, 22, 23, 28, 29

CONSTITUTIONAL PROVISIONS

United States Const., amend. I . . . . . *passim*

STATUTES, RULES AND REGULATIONS

18 U.S.C. § 2257 . . . . . *passim*

18 U.S.C. § 2257A 3, 14

28 U.S.C. §1254(1) 2

TABLE OF AUTHORITIES (cont'd)

28 U.S.C. § 1331 5

28 U.S.C. § 1346 (a)(2) 5

28 U.S.C. § 2201 5

Pub. L. 108-21, Title V, § 511(a), 117 Stat. 684 3,13

Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, Title V, §§ 502(a); 503 (a); 120 Stat. 625, 626 ..... 2, 3, 14

28 C.F.R. § 75, *et seq.* 2, 13, 14, 21

70 FR 29619 3

70 FR 29607 13

73 FR 77432 3

EXECUTIVE MATERIALS

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OTHER AUTHORITIES

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R. Fallon, *As-Applied Challenges and Facial Challenges and Third-Party Standing,* 113 Harv. L. Rev. 1321 (2000) 20

R. Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853, 856 (1991) 26

T. Gould, *The Lifestyle: A Look at the Erotic Rites of Swingers*, Firefly Press (2000) 6

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TABLE OF AUTHORITIES (cont'd)

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G. Metzger, *Facial and As-Applied Challenges Under the Roberts Court,* Columbia Public Law & Legal Theory Working Papers, Paper 09161 (2009) 26

Overbreadth Doctrine : United States v. Williams, 122 Harvard L. Rev. 385 (2008) 26

R. Waggoner, *Mormon Polygamy: A History,* Signature Books (1986) 6

PETITION FOR A WRIT OF CERTIORARI

Connection Distributing Co., Rondee Kamins, Jane Doe and John Doe petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, sitting *en banc*.

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, reported at 557 F.3d 321 (6th Cir. 2009) is set forth in the separately bound appendix at App. 1-103. The panel decision, originally reported at 505 F.3d 545 (6th Cir. 2007), is set forth at App. 108-71. The unreported memorandum opinion of the United States District Court for the Northern District of Ohio granting summary judgment for the second time and denying preliminary injunctive relief is set forth at App. 172-96. The unreported opinion of the court of appeals of September 24, 2002, reversing the first grant of summary judgment and remanding for further proceedings is reported at App. 197-99. The unreported memorandum opinion of the United States District Court for the Northern District of Ohio initially granting summary judgment is set forth at App. 200-16. The opinion of the court of appeals affirming the denial of preliminary injunctive relief, reported at 154 F.3d 281 (6th Cir. 1998) *cert denied,* 526 U.S. 1087 (1999) is set forth at App. 217-51. The unreported memorandum opinion of the United States District Court for the Northern District of Ohio, denying preliminary injunctive relief is set forth at App. 252-64.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit, *en banc*, was entered on February

20, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution is reprinted in the Appendix to this Petition at App. 265. Title 18 U.S.C. § 2257 and its implementing regulations, Title 28 C.F.R. § 75, *et seq.* are reprinted at App. 266-88. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, Title V, §§ 502(a); 503 (a); 120 Stat. 625, 626. App. 289 is reprinted at App. 289-305.

INTRODUCTION

At issue is a federal criminal statute whose constitutionality has been questioned and examined since its inception–first in the federal courts for the District of Columbia, *American Library Association v. Thornburgh,* 713 F. Supp. 469 (D.D.C. 1989); *American Library Association v. Barr,* 956 F. 2d 1178 (D.C. Cir. 1992); *American Library Association v. Barr,* 794 F. Supp. 412 (D.D.C.1992); *American Library Association v. Reno,* 33 F. 3d 78 (D.C. Cir. 1994) *cert denied,* 515 U.S. 1158 (1995) and then in the proceedings in the District Court for the Northern District of Ohio and Sixth Circuit that bring the Petitioners to this Court.[1]

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[1] The Tenth Circuit Court of Appeals also evaluated 18 U.S.C. §2257 and its implementing regulations in *Sundance Associates, Inc. v. Reno,* 139 F.3d 804 (10th Cir. 1998), finding a portion of the regulations implementing 18 U.S.C. §2257 then in effect improperly exceeded the scope of the statutory authority and therefore, struck down that portion of the regulations as an invalid

In 1994, in a split decision, the D.C. Circuit Court of Appeals upheld the law as applied to the plaintiffs there–declining to address the statute's overbreadth because of its concern that the record failed to present it with "concrete facts that would enable [it] to test the limits of the Act." *American Library Association,* 33 F. 3d at 83, 90. The dissent, however, found 18 U.S.C. §2257 to be unconstitutionally overbroad, *id.* at 95. Subsequently, Judge Tatel, joined by Judge Wald, dissenting from the court's denial of rehearing *en banc,* identified the "difficult dilemma" the statute "imposes upon speakers" and its potentially significant impact on speech. *American Library Association v. Reno,* 47 F. 3d 1215, 1217 (D .C. Cir. 1995)

As detailed below, the Sixth Circuit has similarly wrestled with the issue of the statute's constitutionality, arriving at equally conflicting conclusions.

In the meantime, the statute has been amended to expand its reach and scope, has been implemented by a series of increasingly burdensome regulations and has been supplemented by a companion statute, 18 U.S.C. § 2257A. Pub. L. 108-21, Title V, § 511(a), 117 Stat. 684; 70 Fed. Reg. 29619; 73 Fed. Reg. 77432; Pub. L. 109-248, Title V, § 502(a), 120 Stat. 625; § 503(a), 120 Stat. 626. App. 289– which makes the constitutional questions under the First Amendment raised by this statutory scheme all the more important.

The case that has evolved here presents a perfect canvas for the Court to resolve these questions. Its

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implementation of the statute.

record has been fully developed over the course of thirteen years, after two evidentiary hearings and multiple trips to the court of appeals; the five opinions of the *en banc* court–one majority opinion and four dissents, that consume fifty pages in the official reporter–are scholarly and thoughtful, and the constitutional issues raised regarding free expression are thirsty for resolution by this Court.

STATEMENT OF THE CASE

Title 18 U.S.C. § 2257 and its implementing regulations require, on penalty of a prison term of up to five years, that anyone who produces a visual depiction containing explicit sexual imagery acquire and maintain government-issued photo identification for each person portrayed in that depiction. The photo identification must be made available for inspection by government investigators, who are authorized to appear without prior notice and demand "to enter without delay and at reasonable times" the premises where those records are maintained. Each depiction or publication containing sexual imagery must also bear a label identifying the custodian and location of the requisite records. The statute applies to all visual genres–printed, digital or Polaroid photographs; images in a movie, video or DVD; those appearing on the Internet as an attachment to an e-mail or exhibited on a website; or images displayed on a cell phone screen– to name a few.

The statute evolved from a recommendation by the Attorney General's Commission on Pornography that called for the enactment of a statute requiring "the producers, retailers or distributors of sexually explicit visual depictions to maintain records containing

consent forms and proof of performers' ages." *Attorney General's Commission on Pornography, Final Report, July 1986,* p. 618, *Recommendation 37.* The Commission explained that record-keeping requirements would make it easier for "law enforcement officers to ascertain whether an individual in a film or other visual depiction [was] a minor," mitigating a perceived problem resulting from the adult film industry's trend toward using younger models in its productions. *Id.* at 618-19.

The problem is, however, that Congress drained the pond to catch a fish.

Title 18 U.S.C. § 2257's record-keeping requirements apply to ***all*** expression featuring sexually explicit imagery–whether a demonstrative photo of geriatric sexual behavior in a medical textbook; a photo depicting mature adult models engaged in sexual activity printed in an art book; or a Polaroid photo of an intimate moment shared by a husband and wife in the privacy of their bedroom.

In September of 1995, after roughly two months of compliance efforts with the statute's record-keeping and labeling requirements, Petitioner Connection Distributing Co., a publisher of swingers' magazines containing explicit sexual imagery, filed suit, challenging 18 U.S.C. § 2257, on its face and as applied, under the First Amendment. 28 U.S.C. §§ 1331,1346 (a)(2) and 2201.[2]

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[2] The factual recitation that follows is based on evidence and stipulations adduced at two evidentiary hearings–one in 1996 on Connection's original Motion for a Preliminary Injunction and the second in 2005 on Petitioners' second Motion for a Preliminary

To understand the statute's effect on Connection and its readership, an appreciation of "swinging" is necessary. Swinging is a philosophy founded on the belief that sharing sexual experiences with other like-minded adults is an important ingredient of a mature and full relationship and that sexual monogamy is contrary to human nature.[3]

Swingers, notwithstanding their unorthodox outlook on sexual relationships, are otherwise

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Injunction following amendments to the statute and promulgation of new implementing regulations–as well as on evidence contained in affidavits submitted in opposition to the government's first motion for summary judgment. The transcripts of the hearings, the stipulations, and the affidavits are contained in the Joint Appendix filed in the court below at Apx. 363-545, 546-675, 735-844, 845-942, and 1007-1012.

[3] Swinging as a belief system has piqued academic inquiry and research. R. Jenks, "Swinging: a Replication and Test of Theory," Journal of Sex Research 21, 199 (1985); R. Jenks, "Swinging: A review of the Literature" Archives of Sexual Behavior 27, p. 507 (1986); T. Gould, *The Lifestyle: A Look at the Erotic Rites of Swingers*, Firefly Press (2000); C. Bergstrand, J. Williams, "Today's Alternative Marriage Styles: the Case of Swingers," Electronic Journal of Human Sexuality, Vol. 3 (2000). While swingers' notions regarding sexuality are non-traditional, they are by no means original. See, S. Klaw, *Without Sin: The Life and Death of the Oneida Community*, Allen Lane/Penguin Press, (1993) (chronicling the utopian community of Oneida, New York who believed monogamy was a sin); N. Braun, J. Campbell, E.N. Jencks, *The History and Philosophy of Marriage: A Christian Polygamy Sourcebook*, Logos Press (2005); R. Waggoner, *Mormon Polygamy: A History*, Signature Books (1986); Albert Einstein to Eugenia Anderman, June 2, 1953, *Albert Einstein Archives* 59-097: "You must be aware that most men (and many women) are by nature not monogamous." W. Isaacson, *Einstein: His Life and Universe*, Simon & Schuster, p. 614. n.14 (2007).

remarkably ordinary people: the vast majority are middle-aged adults who value family life, consider themselves religious, hold middle-of-the-road political beliefs–(studies have found that swingers lean toward being Republican)–are mothers, fathers and grandparents, teachers, secretaries, lawyers, judges, police officers and doctors. In short, they are "pretty mainstream individuals." (Bergstrand, Tr.2005 at 59).

According to Plaintiffs' expert, more than three million adults engage in swinging. So while swingers' beliefs are controversial and unorthodox, their numbers are not inconsequential.

Swinging is a philosophy and lifestyle of mature adults; most swingers left the age of majority behind long ago. Dr. Robert McGinley, one of Plaintiffs' experts, who has had a lengthy academic and business career focusing on the swinging community and lifestyle, explained that swinging requires a mature outlook about commitment and sexuality, developed over the course of a relationship. Younger adults lack the experience fundamental to an interest in or commitment to swinging. Dr. McGinley testified that the overwhelming majority of swingers, therefore, are in their 30s, 40s and 50s with some participants in their 60s and 70s. The research of Plaintiffs' other expert witness, Dr. Curt Bergstrand, a professor of sociology at Bellarmine University, and the experience of Patricia Prementine as Connection's editor, likewise established that the vast majority of swingers are older adults. Dr. Bergstrand's research revealed that their average age is 39.

Confirmation of Plaintiffs' evidence that swingers are overwhelmingly mature adults who could not

reasonably be mistaken for minors came from the government's own witnesses.

The government's expert, Dr. Francis Biro, a physician specializing in adolescent and pediatric medicine, reviewed stacks of Connection's magazines, and while he testified that as to a small number of the photographs, there was not enough information to establish an age, he concluded that the vast majority depicted persons in their 30s, 40s and 50s and that no photo identification was necessary to establish that they were older than the age of majority.

Dr. Biro testified:

> Q. [A]s to the vast majority of photographs depicting people who are obviously over 21, you don't need a photo identification to come to the conclusion that they are over 21, do you?
>
> A. I do not, no.
>
> Q. And you wouldn't expect that anyone else would need a photo identification to come to that conclusion as to the vast majority of the people depicted in these magazines, correct?
>
> A. I agree.

(Biro, 1996 Tr. at 115).

The government's evidence pertaining to messages published on a swingers' website on the Internet (not Connection's) also confirmed Petitioners' contention that minors play no role in swinging.

Kristi Witsman, a computer forensic specialist employed by the Department of Justice, performed various searches of a website, adultfriendfinders.com, touting itself as the "World's Largest Sex and Swinger Personals Site," in an attempt to demonstrate that a substantial number of personal ads submitted by couples considered to be swingers were placed by young adults, at least one of whom was between the ages of 18 and 21.

Ms. Witsman's searches demonstrated the opposite to be the case. Between 94% and 98% of the ads were placed by couples, both of whose members were more than twenty-one years old, depending on the category of messages searched.

Fundamental to the adults who engage in swinging–given its stigmatizing potential–is the ability to communicate with other adults who share the same beliefs and interests with the assurance that those communications remain private and confidential. Connection Distributing Co.'s magazines provided a forum for those communications.

Readers would submit their messages, many of which included sexually explicit photographs, with personal data and payment information to Connection, who would then assign a code to each message. In this way, although the messages revealed very personal and private aspects of their bodies, they remained truly anonymous. Connection would then forward any responses to the published messages to the persons

who placed them.[4]

The photos appearing in the pages of Connection's magazines are undeniably controversial, no doubt offensive to many, and vulnerable to claims that they are unimportant and tasteless. [5] None of those characteristics, however, denies that expression the shelter of the First Amendment. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

The effect of 18 U.S.C. § 2257's age verification and record-keeping requirements on Connection and its readership was quick and dramatic. Faced with the prospect of producing photo identification for government inspection as a condition of publishing

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[4] In 1997, Connection also began operating a website where swingers who purchased memberships could privately e-mail messages to one another, including photos, and engage in other online activities with one another.

[5] Nonetheless, the sexual imagery in these messages is no different than Bronze Age rock engravings depicting sexual behavior, *see* M. Kauth, *Handbook of the Evolution of Human Sexuality,* (Haworth Press, Inc. 2006) pp. 76,77, explicit sexual imagery in Roman art, *see* J. Clarke, *Looking at Lovemaking: Constructions of Sexuality in Roman Art, 100 B.C. -A.D. 250,* (University of California Press 1998), erotic imagery on Byzantine ivory caskets; L. James, ed. *Desire and Denial in Byzantium:* Papers from the Thirty-first Spring Symposium of Byzantine Studies, Brighton, March 1997. (Ashgate Variorum, 1999) or the demonstrative illustrations in the *Kama Sutra.* And it would be regarded by a number of the early founders and proponents of the First Amendment as fully deserving of its protection. *See, United States v. 12 200-Foot Reels of Super 8mm. Film,* 413 U.S. 123, 132-33 (1973) (Douglas, J., dissenting) (describing Benjamin Franklin's and others' views of sexually candid expression).

their expression, swingers chose to remain silent. They overwhelmingly refused to produce photo identification for government inspection.

Dr. McGinley, Dr. Bergstrand and Connection's editor explained why swingers appreciate and fear the grave consequences of disclosing this aspect of their private sexual lives. Swingers' fears were two-fold. First, they did not want to disclose their private sexual beliefs to their government and feared harassment by the government that such revelation might engender. Second, they feared that providing their photo identification for government inspection could lead to their lifestyle being revealed to their neighbors, friends, business associates, churches and the public at large. [6] As this Court observed in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995): "The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.* at 341-42.

The statute, thus, choked off a robust category of expression that was of importance and interest to Connection and its readership. Connection was forced to stop publishing many of its magazines, because so

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[6] See *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 754 (1996) (striking down a statutory provision that required a citizen to provide written notice to cable operator requesting transmission of channels that broadcast "patently offensive" shows on the ground that the notice requirement restricted "viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel.")

few of its readers were submitting messages with the requisite photo identification.

Indeed, by the time of the second evidentiary hearing in 2005, Connection had ceased publishing 12 of its 22 magazines and faced the prospect of shutting down more of its publications if relief could not be obtained.

The district court denied Connection's initial motion for a preliminary injunction in January1997. App. 252. Connection appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed the denial of preliminary injunctive relief, App. 217, reported at 154 F.3d 281, and this Court denied Connection's petition for certiorari from that ruling. *Connection Distributing Co. v. Reno*, 526 U.S. 1087 (1999).

On remand, the district court stayed discovery and subsequently granted the government's motion for summary judgment on May 25, 2000. App. 200. Connection appealed once again.

On September 24, 2002, the Sixth Circuit reversed and remanded for further proceedings. App 197. The court specifically directed the district court to consider Plaintiff's challenges in light of then recent decisions of this Court, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). App. 198.

After the case was remanded, Congress amended

18 U.S.C. § 2257 twice. The first amendment in 2003 made two substantial and material changes: the statute's requirements were expanded to apply to visual depictions published on the Internet, and the statute, which originally provided that records it compelled to be created and maintained could not be used as evidence in criminal prosecutions other than for violations of its own provisions, was amended to allow use of the mandated records as evidence in prosecuting violations of federal obscenity and child pornography laws. Pub. L. 108-21.

Connection amended its complaint to challenge the statute, as amended, and Rondee Kamins, Connection magazines' publisher, and John and Jane Doe, a married couple who engaged in swinging, joined the litigation as plaintiffs.

On June 23, 2005, new regulations implementing the statutory amendments applying the record keeping requirements to visual depictions on the Internet took effect. 70 FR 29607. App. 272-88.

The amended regulations clarified the obligations imposed by the statute and the powers of those charged with its enforcement. The regulations made clear that an investigator could demand entrance to premises without notice or warrant and search the personal information contained in the requisite records. The investigator could copy any records subject to inspection and, without a warrant, could seize "any evidence of the commission of a felony while conducting an inspection." § 75.5 (g). App. 284. The regulations imposed no restrictions on the use of this evidence. Moreover, the regulations expressly stated that they imposed no restriction on the other "investigative

prerogatives of the investigator." § 75.5 (f); App. 284.

Plaintiffs filed another motion seeking preliminary injunctive relief against the enforcement of the newly promulgated regulations.

The district court, after conducting another evidentiary hearing on August 26, 2005, denied injunctive relief and again granted summary judgment in favor of the government.[7] App. 172. Connection filed yet another appeal.

After Petitioners had filed their third appeal, Congress, on July 27, 2006, once again amended the statute and regulations to add visual depictions of "lascivious exhibition of the genitals or pubic area" as expression subject to its record-keeping and labeling requirements; at the same time, Congress enacted a companion statute, 18 U.S.C. §2257A, that applies these same record-keeping requirements to visual depictions of simulated – as opposed to actual – sexual conduct. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, Title V, §§ 502(a); 503 (a); 120 Stat. 625, 626. App. 289. Regulations implementing the amended statute and 18 U.S.C. § 2257A were issued on December 18, 2008.

On October 23, 2007, a panel of the Sixth Circuit reversed the district court's grant of summary judgment in the government's favor and struck down

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[7] The district court, however, concluded that Connection's website was exempt from compliance with the regulations under 28 CFR § 75.1 (c)(4)(iv) and (v) as a web-hosting service and/or remote computing service. App. 193. The government did not appeal that decision.

18 U.S.C. § 2257 and its implementing regulations as unconstitutional, in an opinion written by Judge Kennedy. App. 108. The panel unanimously agreed that the statute was unconstitutionally overbroad–with one member of the panel "agreeing with much of the majority's thoughtful opinion," but finding that the statute could be salvaged by severing a portion of it.(McKeague, J.) (concurring in part and dissenting in part). App. 160. Another member of the panel concluded that, in addition to being unconstitutionally overbroad on its face, 18 U.S.C. § 2257 was unconstitutional as applied to Plaintiffs. (Moore, J.) (concurring). App. 148.

The Sixth Circuit subsequently granted the government's petition for rehearing *en banc*. App. 106.

On February 20, 2009, the Sixth Circuit Court of Appeals, sitting *en banc*, affirmed the district court's grant of summary judgment, finding 18 U.S.C. §2257 to be constitutional[8]–over the dissent of six judges expressed in four dissenting opinions. App. 1.

In assessing the government's motion for summary judgment, all facts were to be viewed and all reasonable inferences drawn in favor of Petitioners. *Crawford v. Metropolitan Government of Nashville and Davidson County*, __U.S. __, 129 S.Ct. 846, 849, n. 1 (2009). The majority of the *en banc* court stumbled in meeting that obligation, however.

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[8] Judge Sutton wrote the majority opinion in which Boggs, C.J., Batchelder, Daughtrey, Gilman, Gibbons, Rogers, Cook, McKeague, Griffin and Kethledge, JJ., joined.

For example, in the face of overwhelming and unrebutted evidence that Connection's readership refused to provide the requisite photo identification for fear of disclosure of their unorthodox beliefs to the government and for fear that members of their community might become privy to their beliefs because of such disclosure, the majority altogether dismissed that evidence–finding that no one would "shy away" from disclosing their identities to the government or have a reasonable basis to do so. App. at 14.

The majority also accepted the government's claim that without a universal age verification requirement, the subjectivity inherent in proof of age determinations would not suffice to serve the governmental interest in the protection of minors advanced by the statute, particularly because some photographs in Connection's magazines depicted only body parts and not the image of the entire person. App. 17. However, this conclusion ignored the evidence–both Plaintiffs' and the government's–decidedly showing that minors were not part of the swinging community; that Connection's readers were overwhelmingly middle-aged adults and that the vast majority of the photographs appearing in Connection's publications were of unmistakably mature adults in their 30s, 40s and 50s, and photo identification was unnecessary to prove as much.

Further, the majority, in rejecting Plaintiffs' as-applied challenge, stated that the dissent had made "a convincing case why the law would have difficulty withstanding an as-applied attack by a mature-adults-only magazine that included photographs only of readily identifiable mature adults" App. 23-24,–***which is, in fact, precisely what the record demonstrated about Connection's magazines, particularly viewing***

the evidence in a light most favorable to Plaintiffs, as was required.

Finally, the majority dismissed Plaintiffs' facial challenge on overbreadth grounds, finding the noted instances of the statute's overbreadth to be too "abstract" to merit relief under the overbreadth doctrine. App. 37-38.

The dissenters found 18 U.S.C. §2257 to be unconstitutionally overbroad on its face and unconstitutional as applied to the Plaintiffs.

Judge Kennedy (joined by Judges Martin, Moore, Cole, Clay and White) wrote the lead dissent, meticulously laying out the case for striking down the statute and regulations on overbreadth grounds. App. 43-76. She also concluded that the statute was unconstitutional as applied to Plaintiffs. App. 77-78.

Judge Moore (joined by Judges Martin and Cole) added her voice "to elaborate on the additional conclusion of Judge Kennedy's dissent that § 2257's universal age-verification and record-keeping requirements, which apply equally to old and young alike, are unconstitutional as applied to Connection and John and Jane Doe." App. 79. She also wrote to explain her determination that 18 U.S.C. § 2257 was a content-based regulation that should be evaluated under strict scrutiny. [9]

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[9] Judge Clay and Judge White also wrote dissenting opinions. App. 92-97; App. 98-103.

REASONS FOR GRANTING THE WRIT

I. THE *EN BANC* DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF 18 U.S.C. § 2257 AND ITS IMPLEMENTING REGULATIONS ON THEIR FACE AND AS APPLIED, OVER THE DISSENT OF SIX MEMBERS OF THE COURT IN FOUR SEPARATE OPINIONS, RAISES IMPORTANT QUESTIONS UNDER THE FIRST AMENDMENT.

The chasm–which is wide and deep–between the majority's opinion below and those of the four dissents illustrates the need for guidance and clarity from this Court. The issues on which they disagree lie at the very heart of our jurisprudence plotting the line between constitutional and unconstitutional governmental regulation of protected expression.

A. An Important Question Is Presented as to Whether 18 U.S.C. § 2257 and Its Implementing Regulations Are Unconstitutional Under the First Amendment As Applied to Petitioners.

Title 18 U.S.C. § 2257, as applied to Petitioners, has the effect of eliminating an entire category of protected expression. Swingers who wish to place messages containing sexually explicit photographs in Connection's magazines anonymously and thus without submitting photo identification for inspection by their government are prohibited from doing so by the statute.

Even applying intermediate scrutiny,[10] Petitioners submit the statute is unconstitutional as applied to them, because it is not narrowly tailored and burdens more speech than is necessary to serve the governmental interest the statute was designed to further. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

The stated purpose of the statute's record-keeping requirements is to provide a tool for law enforcement in distinguishing between young-looking adults and minors in sexually explicit expression to assist it in preventing and prosecuting child pornography. *Attorney General's Commission on Pornography, Final Report, July 1986,* p. 618.

The evidence adduced by Petitioners, however, demonstrated that 18 U.S.C. § 2257 suppressed a large and vital category of protected expression depicting adults in their 30s, 40s and 50s whose maturity was visible and easily discernible. No photo identification was required to establish that the vast majority of those depicted in Connection's magazines were adults.

Swingers, in the face of the statute's record-keeping and labeling provisions, chose to remain silent. The statute thus extinguished their expression and with it, the content of Connection's magazines.

The government, which bore the burden of demonstrating that 18 U.S.C. § 2257 was nonetheless narrowly tailored and did not burden more speech than

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[10] Petitioners argue, *infra* at pp. 26-27 that 18 U.S.C. § 2257 is a content-based statute that must satisfy strict scrutiny.

was necessary, failed to make that showing here. *Sable Communication v. FCC*, 492 U.S. 115, 126(1989); *Denver Area Consortium v. FCC*, 518 U.S. 727, 754-55(1996); *Ward v. Rock Against Racism*, 491 U.S. 781, 789(1989); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505(1996).

As Judge Moore wrote in her dissenting opinion:

> [I]n the vast majority of instances, applying § 2257's age-verification and record-keeping requirements to this population [of swingers] does not advance the government's interest in preventing child pornography, but instead operates to burden constitutionally protected speech without any corresponding benefit.

App. 86.

All six dissenters agreed that 18 U.S.C. § 2257 and its implementing regulations are unconstitutional as applied to Petitioners. App. 77-78, 79-91, 92-97, 98. And, indeed, the majority itself–while discounting Plaintiffs' evidence regarding the clarity and completeness of the photographs available to Connection–acknowledged the unconstitutional application of 18 U.S.C. § 2257's universal age-verification requirements as applied to depictions of "readily identifiable mature adults." App. 23-24.

The Court has recognized the importance of as-applied challenges in shaping its precedent, characterizing such challenges as "the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*. 550 U.S. 124, 168 (2007) *quoting* R. Fallon, *As-Applied Challenges and Facial Challenges and*

Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000). This case presents the opportunity to add a building block.

B. An Important Question Is Presented as to Whether 18 U.S.C. § 2257, Which By Its Plain Terms Applies to All Sexually Explicit Visual Depictions – Both Commercial and Non-Commercial – and Imposes a Universal Age Verification Requirement, Without Regard to the Obvious Maturity of Those Depicted, Is Unconstitutional on Its Face Under the First Amendment Due to Overbreadth.

The statute, by its plain terms, applies to all visual depictions–both commercial and non-commercial–containing sexually explicit imagery. *See* 18 U.S.C. § 2257 (a), (h). App. 266, 270.

As a condition of communicating visual expression with sexual imagery, an artist, a lover, a wife, a husband, an Internet matchmaking website, or a magazine publisher, among others, must create and maintain identification records in connection with their imagery for inspection by government agents. In this way, 18 U.S.C. § 2257 removes that category of expression from the conversation of ideas that can be conducted between adults anonymously.

Not only must producers of sexually explicit expression create and maintain records, but their expression must bear a label that identifies the address where the identification records can be found, with the name of the records' custodian. 18 U.S.C. § 2257 (e)(1), App. 268; 28 CFR §§75.6, 75.8. App. 284-86, 287-88.

In addition to the speech of Petitioners and their readers, the statute brings within its sweep a vast amount of other protected expression: an army wife e-mailing a suggestive photo of herself to her husband in Baghdad, two adults "sexting"[11] messages to one another on their cell phones, adults privately posting sexually candid photos to one another on a social networking website, appropriationist artists who compile artwork from others' photos with sexually explicit content, photographers who create erotic art, and the creators or publishers of educational material that contains sexually explicit content. As the dissent explained, it applies not only to "protected speech between neighbors" citing *Watchtower,* 536 U.S. at 166, but also to "protected speech between friends, lovers and a husband and wife." App. 50. As such, "it applies to a class of materials much broader than those depicting what Congress ultimately seeks to prevent." App. 82. And it subjects the personally-produced sexually explicit expression of millions of adults to its restrictions. App. 99. (*citing* Stipulation Between Parties reflecting website searched by government contained more than 13 million sexually explicit communications.) *See also dissent* at App. 64. ("[D]igital video and still cameras have become ubiquitous, where before the capacity to capture sexually explicit images may have resided in far fewer people. This means equally a rise in production of non-commercial sexually explicit imagery and commercial pornography involving a broader range of interests." (Footnote omitted).)

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[11] "'Sexting' v: the act of text messaging someone in the hopes of having a sexual encounter with them later; initially casual, transitioning into highly suggestive and even sexually explicit." www.urbandictionary,com (last visited May 5, 2009).

The statutory provisions that remove the cloak of anonymity from this large body of intimate and personal communications effectively silences it, however. Citing *Watchtower, Shelton v. Tucker,* 364 U.S. 479, 486 (1960) and *Talley v. California*, 362 U.S. 60, 64-65 (1960),the dissent explained why:

> [M]andated government disclosure chills both anonymous public and private speech–that is, it chills speech that may be in disfavor with the government– and it does so whenever the government requires disclosure even if only to the government itself.

App. 50-51. Moreover, it noted that Petitioners' speech also "has been chilled by their fear that the government will view their images as obscene and will prosecute them for obscenity. Given the vagueness historically associated with defining obscenity, this fear cannot be said to be irrational. *See e.g., Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ('I know it when I see it.....')." App. 84.

The majority acknowledged that the statute presented the potential for unconstitutional applications. It determined that these potential unconstitutional applications did not justify striking the statute down as overbroad on its face, however, on the theory that the statute has a sufficiently substantial legitimate sweep in its application to sexually explicit material commercially produced by the adult film industry featuring youthful-looking actors and actresses. App. 33-34.

But as Judge Kennedy explained in her dissent, even in *that* application, the burden of the statute falls

entirely upon constitutionally protected speech, a circumstance that actually exacerbates the statute's overbreadth.[12] Judge Kennedy wrote:

> Nor is the constitutionality of the statute as applied to young-looking models in commercial pornography plain....Section 2257 requires records of young-looking models–otherwise known as those models who appear to be children–in an effort to regulate actual child pornography, an analogous situation to that in *Free Speech Coalition*....*Free Speech Coalition* calls into question whether the application of § 2257 to young-looking models in commercially sexually explicit imagery is plainly legitimate.

App. 66.

And outside of the context of the adult film industry, Judge White, in her dissent, explained how wrong the majority was in suggesting, in an absolute

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[12] The irony is that there is no proof that the problem prompting the passage of 18 U.S.C. §2257–that the mainstream adult film industry recklessly or negligently employed actors or actresses who were actually underage–ever existed and certainly no proof that such a problem currently exists. The one example cited of the adult industry's use of a minor in adult films is Traci Lords, who with her agent "perpetrated a massive fraud on...the adult entertainment industry...in...an artful, studied and well-documented charade whereby Lords successfully passed herself off as an adult." *United States v. United States District Court*, 858 F.2d 534, 536 (9th Cir. 1988). Adding to the irony is the fact that given Ms. Lords' elaborate fraud, the statute's recordkeeping provisions would not have prevented her appearance in adult films.

sense, the overbreadth of the statutory scheme is not substantial:

> My joining in Judge Kennedy's conclusion that the facial challenge should be upheld is based not only upon the application to the private couple, but also upon its application to plaintiffs and those like them, and to all adults who desire in any fashion to create or share, or disseminate non-obscene, sexually explicit depictions of themselves, or other adults without relinquishing their anonymity. While the majority correctly observes that we have no proof regarding the number of individuals who would be adversely affected by the application of § 2257, we do know that millions of adults exchange or share personally-produced sexually explicit depictions. *See* J.A. at 1007-11 (stipulation of the parties noting the existence of, and incorporating an exhibit listing, over 13 million personal ads containing sexually-explicit text and images on a single website for sex and swinger personal ads, of which those examined showed that 94% involved adults over 21).

App. 99.

The question of when the overbreadth of a law is substantial keeps bubbling up to the surface in case after case. *See e.g., United States v. Stevens,* 533 F.3d 218 (3rd Cir. 2008) *en banc, cert. granted,* ___U.S.__ (Apr. 20, 2009); *Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services,* 525 F.3d 1073 (11th Cir. 2008); *Borden v. Sch. Dist. of Tp. of East Brunswick,* 523 F.3d 153 (3rd Cir. 2008);

Faustin v. City and County of Denver, 423 F.3d 1192 (10th Cir. 2005).

This case serves as an appropriate vehicle to clarify this aspect of the overbreadth doctrine and to achieve consistency in the doctrine's application. *See* R. Fallon, *Making Sense of Overbreadth,* 100 Yale L.J. 853, 856 (1991); *See generally,* Note, *Overbreadth Doctrine: United States v. Williams,* 122 Harvard L. Rev. 385 (2008); G. Metzger, *Facial and As-Applied Challenges Under the Roberts Court,* Columbia Public Law & Legal Theory Working Papers, Paper 09161 (2009).

C. An Important Question Is Presented as to Whether 18 U.S.C. § 2257 Is a Content-Based Regulation of Speech That Must Withstand Strict Scrutiny, as the Dissent Concluded, or a Content-Neutral Regulation and, Therefore, Subject to Intermediate Scrutiny, as the Majority of the *En Banc* Court Held.

On its face, 18 U.S.C. § 2257 is a content-based regulation of speech: it singles out a particular category of expression (visual depictions of sexually explicit conduct) and restricts its dissemination by imposing identification and labeling requirements on it.

The majority concluded that 18 U.S.C. § 2257 is, nevertheless, content-neutral because it is justified as an aid in the enforcement of child pornography, a category of unprotected speech. But as Judge Moore explained in her dissent:

[T]he evil at which § 2257 is aimed, child

> pornography, is a type of speech, albeit, unprotected, that is a subset of the regulated speech, sexually explicit images. It is therefore impossible to separate the content-based aspect of the regulation from the justification [of deterring the depiction of children in sexually explicit expression], as the justification itself relates to an aspect of the speech: its sexually explicit nature.

App. 80.

Moreover, "[t]he government's purpose is the controlling inquiry" in distinguishing between content-based and content-neutral regulations of expression. *Ward,* 491 U.S. at 791. To qualify as content-neutral, a regulation must "serve[ ] purposes unrelated to the content of expression." *Id.*

The purpose of 18 U.S.C. § 2257, according to the government, is to prevent the use of minors in visual depictions of sexually explicit activity. While that objective is no doubt worthy and laudable, it cannot be said that it is unrelated to the content of expression. Indeed, in keeping with that purpose, the statute is designed precisely to influence and affect the content of sexual expression. Specifically, the goal of the statute is to induce a producer of visual depictions to make one of two choices: either (1) use only adult performers if his work includes depictions of sexual activity, or (2) remove any sexual activity from the work if using a performer who has not yet reached the age of majority.

The statute is therefore a content-based regulation of speech that must satisfy strict scrutiny.

II. THE *EN BANC* COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *WATCHTOWER BIBLE & TRACT SOCIETY OF N.Y., INC. v. VILLAGE OF STRATTON*, 536 U.S. 150 (2002) AND *ASHCROFT v. FREE SPEECH COALITION*, 535 U.S. 234 (2002).

In *Watchtower*, this Court struck down a Village ordinance that required solicitors to provide identifying information about themselves to the Village authorities as a condition of being permitted to proselytize for various causes door-to-door. This Court found that the ordinance unconstitutionally compelled the solicitors to relinquish their right to speak anonymously, relying on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995). 536 U.S. at 166. *See also LaMont v. Postmaster General*, 381 U.S. 301 (1965).

The dissent, below, found 18 U.S.C. § 2257 similarly flawed under *Watchtower* and determined that *Watchtower* required 18 U.S.C. § 2257's invalidation under the First Amendment.

The majority disagreed, finding *Watchtower* distinguishable and non-controlling here.

Similarly, the dissent found that *Free Speech Coalition* required 18 U.S.C. § 2257 to be invalidated as violative of the First Amendment. This Court in *Free Speech Coalition* determined that the statutory burdens imposed on speech that was neither criminal nor unprotected as a means to ban unprotected speech could not be countenanced under the First Amendment. Title 18 U.S.C. § 2257 commits this same

offense.

As with *Watchtower*, the majority dismissed *Free Speech Coalition* as distinguishable and non-controlling.

Petitioners submit, however, that the dissent is right. *Watchtower* and *Free Speech Coalition* require invalidation of 18 U.S.C. § 2257 under the First Amendment.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court accept this case for review.

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